No. 83-724

In the Supreme Court of the United States

October Term, 1983

IRENE GOMEZ-BETHKE, Commissioner,
Minnesota Department of Human Rights;
HUBERT H. HUMPHREY III, Attorney General
of the State of Minnesota; and
GEORGE A. BECK, Hearing Examiner
of the State of Minnesota,
appellants,

v.

THE UNITED STATES JAYCEES, a non-profit Missouri corporation, on behalf of itself and its qualified members,
appellee.

On Appeal from the United States Court of Appeals
for the Eighth Circuit

AMICUS BRIEF OF ALLIANCE FOR WOMEN MEMBERSHIP IN SUPPORT OF APPELLANTS

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INTEREST OF THE AMICUS CURIAE

The Alliance for Women Membership is a national organization comprised of individuals and entities who believe that membership in the Jaycees organization should be open to women on the same basis as it is open to men. In addition to male and female Jaycees who, as members of the Alliance, advocate full and equal membership for women, the Alliance is comprised of many former male and female members, present sponsors of Jaycees membership, and former sponsors who have ended their sponsorship because of the Jaycees' sexually discriminatory policy. Other equality-minded individuals and entities who support the principle of equal opportunity for women and men are also members of the Alliance. Because the organization is comprised of men as well

as women Jaycees who favor giving women full and equal Jaycee membership, its interest in this adjudication is particularly significant.

The Alliance was formed in 1978, in reaction to the United States Jaycees' pronouncement that local chapters which had women as full and equal members must reduce their women members to associate status[1] or face revocation of their Jaycees charters. An additional result of this newly announced Jaycees policy was the institution of lawsuits by women members of affected chapters.[2] The Alliance for Women Membership has been

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1. Associate members do not have the right to vote or hold office or to receive awards.

2. The Minnesota case was one of these lawsuits.

active nationwide in supporting all of the women's rights litigation against the United States Jaycees.

The knowledge that the Alliance has of other lawsuits throughout the country involving the same and similar issues here presented, its knowledge of the internal functioning of the Jaycees organization and its familiarity with the role women already play in the Jaycees organization as associate members, brings a unique perspective and a noteworthy viewpoint to this Court.

SUMMARY OF ARGUMENT

This case does not present any question of the freedom of the United States Jaycees to associate exclusively with men. The Jaycees has chosen freely

and voluntarily to associate with women. It welcomes women as "associate" members. Indeed, it solicits, them; and formal and informal associations between men and women pervade the organization. Women are not aggrieved by exclusion from the Jaycees, but by the invidious deprivation of an equal share in the opportunities to which their association should entitle them. Women Jaycees may not vote, hold office or receive awards; but they attend the Jaycees' meetings, join in its civic, charitable and political activities, subscribe to its "Creed" and otherwise participate fully and visibly in all of its affairs. Women may be confined to the back of the Jaycees bus, but they are fully associated in every way with the Jaycees organization.

Precedents protecting the rights of various organizations to discriminate

freely in selecting or rejecting their associates from a pool of outside applicants can therefore lend the Jaycees no support. Regardless of whether the Jaycees is a private club or a public accommodation, regardless of whether its rights are purportedly grounded in the core of the First Amendment or in the less protected right to privacy, regardless of whether political advocacy is a decidedly minor part of its activities or its very reason for being, the Jaycees' reliance on the doctrine of free association is entirely misplaced. If the United States Jaycees prevails in this adjudication, its women members will be denied the same advantages enjoyed by their male colleagues; but women will continue to associate openly and publicly with the United States Jaycees. There is no issue here presented of the Jaycees being spared any unwanted

associations with women. Regardless of the outcome, women will continue to be recruited as Jaycees members and the Jaycees will continue, just as before, to advance whatever goals and beliefs it chooses to espouse.

Important rights are at stake in this case, but the freedom of the United States Jaycees to select its own associates is plainly not among them.

ARGUMENT

I. <u>The Freedom Of Association Doctrine Affords The Jaycees No Right To Discriminate Against Persons With Whom It Has Chosen Freely To Associate</u>

This Court has held unequivocally that the right of association is a "basic constitutional freedom," <u>Buckley v. Valeo</u>, 424 U.S. 1, 25 (1976) (quoting <u>Kasper v. Pontikes</u>, 414 U.S. 51, 57 (1973)), which "lies at the foundation of a free society," <u>Buckley</u>, 424 U.S. at 25 (quoting <u>Shelton v. Tucker</u>, 364 U.S. 479, 486 (1960)). The Court has defined that constitutionally protected liberty as the "freedom to engage in association for the advancement of beliefs and ideas . . . ." and has further advised that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . . ." <u>NAACP v. Alabama</u>, 357

U.S. 449, 460 (1958). In one of its seminal opinions addressing the right to privacy, the Court has guaranteed associational freedoms to groups which merely "express" their ideas collectively, as well as to those which actively advocate them: "The right of 'association' . . . includes the right to express one's attitudes or philosophies in a group or by affiliation with it . . . ."; and the group at issue need not be political or religious in nature in order to enjoy a protected right of association. Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

But these constitutional truisms lend no support to the United States Jaycees. Even if one assumes that all persons associated with the organization share common beliefs, attitudes, philosophies or ideas, it cannot be disputed that

those persons include women as well as men. In its Motion to Affirm, the Jaycees points out that "the Encyclopedia of Associations lists thousands of organizations . . . which limit their membership to a single sex, or to persons of one religious denomination or ethnic origin." Appellees' Motion to Affirm, Gomez-Bethke v. United States Jaycees, No. 83-724 (U.S. 1983), at 14-15 (hereinafter referred to as Motion to Affirm). Single gender organizations may well be commonplace in our society, but the United States Jaycees is not among them. The Jaycees has admitted many thousands of women members who involve themselves formally, openly and actively in every aspect of the organization's affairs with the full blessing and encouragement of the Jaycees' national leadership. To be sure, women are

restricted to "associate" membership status (a choice of terminology not entirely lacking in irony here). But that designation merely bars women from voting, holding office and receiving awards; it in no way restricts them from associating publicly and visibly with the Jaycees organization. Women are fully associated, not only with the Jaycees' civic, social and charitable activities but also with the advancement of its legislative reforms and quasi-political activities. Further, their involvement in those activities is not passive. Women frequently play an active and aggressive role in the organization's lobbying and other advocacy-oriented activities. They support the Jaycees financially through the payment of annual membership dues. They are not only welcomed but recruited into the organ-

ization. In sum, "[t]he national organization has settled on a policy that admits women to membership, but with the proviso that women shall not be accorded privileges that are full and equal to those accorded to men." United States Jaycees v. McClure, 305 N.W.2d 764, 765 (Minn. 1981).

Justice Douglas has stated the essence of the freedom of association doctrine as boldly and as baldly as it can be expressed:

> The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.

Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179-80 (1972) (Douglas, J., dissenting).

But government has never told the United States Jaycees who its associates must be. Whether or not the Jaycees' founders could have determined lawfully to establish an "all male club," they freely chose not to do so and not to be so "selective" as to exclude women. It is merely the full benefit of association with the United States Jaycees, not the association itself, which the Jaycees organization denies to its female members; and it is the right of a group to select its associates in the first instance, not to afford them disparate rights and privileges once they are selected, which is protected by the freedom of association doctrine.

In any event, as a Massachusetts administrative agency has found, the Jaycees is "an open organization with rapid turnover, whose associational claims are particularly weak. . . . [T]he balance of the interests clearly falls in favor of the nondiscrimination claim, before which the very attenuated associational claims must yield." Fletcher v. U.S. Jaycees, 3 Mass. Discrimination Law Rep. 1036 (Mass. Commission Against Discrimination 1981), Nos. 78-BPA--0058-0071, slip op. at 38. The Constitution places no value on discrimination and affords it no affirmative protection as a form of associational freedom. Norwood v. Harrison, 413 U.S. 455, 469-70 (1973).

Indeed, if any Jaycees have been denied a right of free association, it

can only be those who happen to be women. This Court has recognized that "classifications based upon sex are inherently invidious . . . ." Frontiero v. Richardson, 411 U.S. 677, 687 (1972) (Opinion of Brennan, J.); and "[i]nvidious discrimination takes its own toll on the freedom to associate . . . ." Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974). Even within the subordinate class to which they are relegated by the United States Jaycees, women similarly situated with men are afforded dissimilar treatment. Men who have passed the age of 35 are restricted, together with women, to associate membership; but associate men may continue to receive awards and recognition for their service and achievements; associate women may not.

"There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women not on a pedestal, but in a cage." Frontiero v. Richardson, 411 U.S. at 684. Women members of the United States Jaycees are now demanding an end to that invidious form of discrimination. Under current practices, they

> are not able to achieve the same degree of personal growth or professional advancement as an associate member of the organization. In that lesser capacity, they are not able to hold office. They are thus deprived of the special leadership training . . . offered by the U.S. Jaycees to officers. They are less able to shape policy. They are barred from receiving awards of recognition and service. As one complainant testified, 'It would be like being allowed to go into a restaurant and being able to sit at a table with somebody else, but not being able to order or eat.'

Fletcher v. U.S. Jaycees, Nos. 78BPA0058-0071, slip op. at 16-17.

The Jaycees hierarchy cannot look to the freedom of association doctrine in defense of its policy of internal discrimination. The Jaycees seeks not to exclude unwanted outsiders but to afford unequal treatment to persons already inside its circle of freely chosen associates. In holding for the Jaycees below, the Court of Appeals has declared that its decision was "not controlled by precedent." United States Jaycees v. McClure, 709 F.2d 1560, 1576 (8th Cir. 1983), prob. juris. noted, 52 U.S.L.W. 3509 (U.S. January 9, 1984) (No. 83-724). Indeed, no other court has ever reached the incongruous conclusion that the freedom of association doctrine protects the "right" to discriminate invidiously

against one's own associates; and no reasonable construction of the doctrine can support that illogical result.

II. <u>If Women Are Afforded Equal Treatment By The United States Jaycees, The Jaycees' Right To Express And Advance Its Ideas Will Not Be Impaired</u>.

The elimination of internal discrimination against the United States Jaycees' female associates can have no impact on the Jaycees' privacy rights; nor can it inhibit the expression of any beliefs or ideas which the Jaycees may espouse. For these reasons alone, the Jaycees cannot rely on the freedom of association doctrine.

Even if the Jaycees argues that its privacy rights are at stake in this adjudication, "[i]t is questionable whether association not directed at the exercise of other First Amendment rights

enjoys constitutional protection. See L. Tribe, American Constitutional Law, at 702 (1976). Supreme Court cases upholding a right of freedom of association have involved association in connection with other protected First Amendment activities." United States Jaycees v. McClure, 534 F. Supp. 766, 770 (D. Minn. 1982) (citations omitted), rev'd, 709 F.2d 1560 (8th Cir. 1983), prob. juris. noted, 52 U.S.L.W. 3509 (U.S. January 9, 1984) (No. 83-724). In any event, even if the right of association may be rooted in the right to privacy, as well as in the core of First Amendment values, the Jaycees can surely assert no legitimate privacy claim before this Court. By freely admitting women into its ranks, the Jaycees has determined for itself that its privacy is not invaded by association with women.

Freedom to associate for the expression of ideas, as opposed to the right to privacy, is "closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." Shelton v. Tucker, 364 U.S. 479, 486 (1960). But no impairment of that fundamental right can result from an action which does not impede protected speech or assembly. This is the ruling of Runyon v. McCrary, 427 U.S. 160 (1976). In Runyon, the Court held that the racial desegregation of a private school would in no way impinge upon the school's purported right of association, in part because "there is no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma." Id. at 176.

The Jaycees' discriminatory policy does not apply to its admission prac-

tices. It does not screen out persons who do not share the Jaycees' beliefs or ideas. Rather, it discriminates irrationally against women in the internal allocation of the rights and benefits of Jaycees membership. The elimination of such discrimination can have no inhibiting effect on the expression or advocacy of any "ideas or dogma" which the organization may claim to espouse.

The Court of Appeals appears to have weighed rather heavily in its analysis the existence of the Jaycees "Creed," an unexceptionable recitation contained in the organization's by-laws. The Court of Appeals surmised that "[t]hose who join the Jaycees identify themselves, emotionally and philosophically, with the beliefs expressed in the Creed," and concluded that the existence of the Creed

lends support to the Jaycees' status as a group of like-believing persons entitled to restrict their associations to those who share the same philosophy. United States Jaycees v. McClure, 709 F.2d at 1570. That analysis depends upon a false premise. Women Jaycees raise their right hands and recite the Creed just as their male colleagues do. The Creed appears on women's membership cards, just as it does on those that are issued to men. Like individual men, of course, individual women may differ in the extent to which they actually identify themselves with the principles set forth in the Creed; but there is no reason to believe that, as a class, Jaycees women identify themselves with those principles any less than Jaycees men do.

Nor is there any substance to the Court of Appeals' conjecture that "if

women become full-fledged members in any substantial numbers, it will not be long before efforts are made to change the Jaycee Creed. Young women may take a dim view of affirming the 'brotherhood of man,' or declaring how 'free men' can best win economic justice." Id. at 1571. But even if the most delicate semantic sensibilities may persuade some women to insist that the Creed be revised to affirm the "oneness of humankind" or to declare how "free people" can best win economic justice, it is difficult indeed to detect the resulting substantive damage to the Jaycees' philosophy. The Little League, for example, has had no success in convincing a court that the aims of its charter, which espouses "citizenship, sportsmanship and manhood" would in any way be threatened by the admission of girls. "[A]ssuming 'man-

hood,' in the sense of the charter, means basically maturity of character, just as does 'womanhood,' we fail to discern how and why little girls are not appropriate prospects for learning citizenship and sportsmanship, and developing character, as are boys." National Organization For Women, Essex Chapter v. Little League Baseball, Inc., 318 A.2d 33, 39 (N.J. Super. Ct. App. Div.), aff'd, 338 A.2d 198 (N.J. 1974).

The illogic of the Jaycees' reliance on the freedom of association doctrine is further made apparent by some of the arguments raised in its Motion To Affirm: "The State has dictated, by use of a penal statute, that Jaycees may no longer confine its core belief and central reason for its existence to the advancement of the interest of young male

members but must also serve the interests of young women." Motion To Affirm, supra, at 13-14.

The state has dictated no such thing. The Jaycees itself is probably the best judge of what its "core belief and the central reason for its existence" may be; but the Jaycees has chosen, as an entirely voluntary matter, to associate with women who, in turn, have chosen to associate with the Jaycees. The Jaycees' assertion that the simple step of affording its women associates the right to vote, hold office and receive awards will upset its "core beliefs," whereas mere association with such women will not, is simply absurd. Like that of the Court of Appeals, the Jaycees' assessment of the character of its organization seems to overlook the fact that women are already

in it. The Court of Appeals assumed, for example, that "[a]n organization of young people, as opposed to young men . . . will be substantially different from the Jaycees as it now exists." United States Jaycees v. McClure, 709 F.2d at 1571. In fact, of course, the Jaycees as it now exists is indisputably an organization of young people and not merely one of young men. Similarly, the Court of Appeals suggested that

> [e]ven though we might think that the Jaycees would survive, even be improved, if women were admitted, some scope must be given to the private choice of those who are now in the organization. The right to choose with whom one will associate necessarily implies, within some limits, the right also to choose with whom one will not associate.

Id. at 1576.

That line of reasoning would be more persuasive were it not for the fact that

women <u>have</u> been admitted to the ranks of the Jaycees. "Those who are now in the organization" include women as well as men, and each group has chosen freely and voluntarily to associate with the other. If, as the Jaycees suggests, it is the interests of young men alone which the organization serves, and the interests of men and women are so inevitably certain to come into conflict, why are so many women associated with the group, and why is the group so ready and eager to have them?

Moreover, the Court of Appeals itself has conceded that even the most partisan political positions which the Jaycees has adopted are entirely gender-neutral in content. "Men are no more likely than women, as such, to favor the United Nations or a balanced budget." <u>Id</u>. at

1571. Indeed, the current U.S. Ambassador to the United Nations happens to be a woman, as is the current Director of the Congressional Budget Office.

The several courts which have addressed the question have held uniformly that the enforced termination of discrimination within a given organization has no constitutionally cognizable impact on the right to associate for the advancement of ideas. In Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123, 129 (S.D.N.Y. 1977), the court held that forbidding a law firm to discriminate against an associate attorney for promotion to partnership because of that attorney's ethnic group or religion "does not prevent the partners from associating for political, social and economic goals." The

"promotion" of Jaycees women from "associate" to "individual" membership status is closely analogous. Similarly, in United States v. International Longshoremen's Association, 460 F.2d 497, 501 (4th Cir.), cert. denied, 409 U.S. 1007 (1972), the court held that the forced merger of racially segregated union locals, both of which were contained within the same international union, "will not prevent longshoremen from associating to achieve economic and political goals." See also Runyon v. McCrary, 427 U.S. at 176; Alabama State Federation of Teachers v. James, 656 F.2d 193, 198 (5th Cir. 1981) (if a statute does not "prohibit or discourage" an organization "from advocating any particular idea" it places no burden whatever on associational interests).

In sum, because the United States Jaycees has chosen freely to associate with women, and because the elevation of Jaycees women from "associate" to "individual" membership status could have no impact on the Jaycees' right to associate for the purpose of expressing or advancing any goals or ideas, the freedom of association doctrine affords no support to the Jaycees in this adjudication.

CONCLUSION

The Association For Women Membership respectfully urges the Court to reverse the decision of the Court of Appeals and reinstate the decision of the District Court.

Respectfully submitted,

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